Teleprompter of Portsworth, Inc. d/b/a Teleprompter Cable TV *and* Chester Kouns. Case 9-CA-17562

27 January 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 24 February 1983 Administrative Law Judge James T. Youngblood issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions judge's and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's implicit refusal to defer to the arbitrator's decision pursuant to *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Accordingly, we find it unnecessary to pass on that issue.

DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge: The complaint which issued on March 9, 1982, alleges that in September 1981[1] Teleprompter of Portsmouth, Inc., d/b/a Teleprompter Cable TV (the Respondent) suspended and ultimately discharged three of its employees because they refused to sign individual agreements with the Respondent stating that they would work certain overtime hours, in violation of Section 8(a)(3) and (1) of the Act. The Respondent filed an answer to the complaint admitting the suspensions and discharges but denies the commission of any unfair labor practices. This matter was heard before me on November 2, 1982, in Portsmouth, Ohio. The parties were represented at the hearing and following the hearing the General Counsel and the Respondent filed briefs which have been duly considered.

Upon the entire record in this matter, and from my observations of the witnesses and their demeanor while testifying, and after due consideration of the briefs filed herein, I hereby make the following

FINDINGS OF FACT AND CONCLUSIONS[2]

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Ohio corporation, has an office and place of business in Portsmouth, Ohio, where it is engaged in the installation and transmission of a cable television service. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that the Communication Workers of America, AFL-CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Diana Fuller, general manager of Respondent at the Portsmouth, Ohio location, became general manager around June 15, 1981. She credibly testified that at that time she walked into a backlog of service, a backlog of installation, a backlog of construction, and at that time they were also going through a refranchising of a 20-year franchise with the city of Portsmouth, which was not going well. In general, the entire cable system needed to be revamped and every piece of equipment had to be checked and, if necessary, replaced in order to bring the system back into good shape. At that time she had six installers, four technicians, one dispatcher, and the chief technician to perform this service. Around June 23, Fuller had a meeting with Charles "Spud" Newman, the union steward, and Bob Arnett, the president of Local 4372 of the Union.[4] Among other things discussed

[1] Unless otherwise specified all dates refer to 1981.

[2] The facts found herein are a compilation of the credited testimony, the exhibits, and stipulations of fact, viewed in light of logical consistency and inherent probability. Athough these findings may not contain or refer to all of the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this Decision may appear to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative weight, surplusage, or irrelevant. Credibility resolutions have been made on the basis of the whole record, including the inherent probabilities of the testimony and the demeanor of the witnesses. Where it may be required I will set forth specific credibility findings.

[3] At the hearing it was agreed between the parties that in the latter part of 1981 the Respondent was purchased by Westinghouse Corporation, and that all of Westinghouse's cable television systems go by the name of Group W. In the Portsmouth, Ohio operation, Group W is now performing the same services to essentially the same customers from the same location with essentially the same management representatives as did the Respondent. It was also agreed that Group W was aware of the unfair labor practices involved herein, and that Group W hired all of the employees, and accepted the existing operation intact and at the same time assumed the collective-bargaining agreement then in effect.

[4] The Union represents the Respondent's employees at its Portsmouth, Ohio facility.

at this meeting, Fuller raised the overtime that was needed from the employees in order to do the work necessary to get the television system back in operation. Fuller advised Arnett and Newman that she was not getting sufficient volunteers for overtime; that the same individuals were volunteering and some of them were working 40 and 50 hours overtime because other individuals were not working overtime at all. At this meeting Fuller informed Arnett that unless she had more cooperation on the volunteer overtime, it was going to have to be made mandatory, in accordance with the collective-bargaining agreement, which provides in article XV, section 8, that:

> Absent qualified volunteers, employees are required to work a reasonable amount of overtime when assigned unless the employee(s) has a legitimate and justifiable excuse. When qualified volunteers are not available, qualified employees shall be assigned by inverse order of seniority.

Fuller informed Newman and Arnett that she needed 10 hours of overtime per man, and that if every man worked 10 hours per week the job would be cleared up by mid-July. Both Arnett and Newman indicated that they could see no problem.

To help in getting the work performed, Fuller also brought in out-of-town employees to assist in the catch-up work, but these employees had to be trained. Many of the employees continued to avoid working overtime, and when it became apparent to the Respondent's hierarchy that the work was lagging behind, Fuller was contacted by her superior, Dolan, who informed her to get the system back in line and do whatever was necessary to get the job done. Fuller made a commitment to Dolan at that time that she would have the work done in approximately 1 month. With that in mind she assessed her situation, her available employees, and concluded that it would take approximately 30 hours of overtime from each employee to get the work done. She then called a meeting of the employees involved for September 11.

At this meeting she explained to the employees present about the backlog of services, installations, and construction and explained that she needed the overtime and that it would have to be made mandatory at this time. She informed the employees that they had a selection of choosing between working 15 hours each week for 2 weeks, or 10 hours each for 4 weeks. At this point Fuller made available to the employees an overtime schedule which in pertinent part provided as follows:

> 2. We must require some overtime for installations, construction, splicing, service calls, etc. Since we have not had enough volunteers, then you have a chose [sic] of the following overtime schedules:
>
> A. 15 hours each week for 2 hours . . . .
>
> *OR*
>
> B. 10 hours each week for 4 weeks . . . .
>
> Please sign the above for the overtime schedule which best suits you. Also, sign the calendar on the back door to indicate the hours you will be working over each day so the office can schedule the work properly.

Fuller first passed this overtime schedule to Chester Kouns, who studied it for a long time and then handed it to Spud Newman. At this point, Fuller said "NO" and took the document and handed it back to Chester Kouns for his selection. At this point, Spud Newman said that he could not commit himself to those hours and stated that he needed "some time to think about it." She asked how long he needed and he asked about the men that were not present. She informed him that they would be back Monday, and would make their choice when they returned. At this point, Newman said "NO," and Fuller stated, "you leave me no choice" and informed him to go home. Newman left, and Chester Kouns stood up and said that he was not going to make his selection or sign the schedule and left also. With one exception, the remaining employees signed the schedule without incident. At this time there was no mention by Newman or Kouns as to why they refused to make a selection in their choice of overtime schedules. On September 14, Spud Newman and Chester Kouns returned to work and Fuller again asked them about the overtime. She explained that they needed the overtime but neither Newman or Kouns would make a choice on what overtime schedule they desired. She informed them that if they did not do so she would have to give them a 2-day suspension, and then if they did not make a selection she would have to terminate them. Both men were given a 2-day suspension.

That same day employee Charles Kouns, who had been absent on September 11, returned to work. Fuller explained to him about the overtime, and Kouns advised that he already knew about it, and stated that he was not going to work, that 40 hours was enough for him. Fuller informed him that if he refused to work overtime he would have to take a 1-day suspension and then if he still refused, a 2-day suspension, if he still refused he would be terminated. Kouns advised her that he understood and stated again that 40 hours was enough for him. He was given a 1-day suspension. That afternoon Fuller met with Elaine Brown of the Clerical Union, and Bob Arnett and Spud Newman. Arnett wanted Fuller to bring the men back to work and pay them for the day that they were off. She said that she could not do that, but she agreed to let both Chester Kouns and Spud Newman come back to work, and would only treat it as a 1-day suspension. If they worked the overtime hours she said they could work under protest, and then they would arbitrate the matter as fast as possible.

On September 15 Charles Kouns returned from his 1-day suspension and refused to sign the sheet selecting choice of overtime and was given an additional 2-day suspension.

On Wednesday, September 17, Charles Newman and Chester Kouns came back to work and refused to make a selection on the overtime and were terminated. They did, however, agree that they would work 8 hours of overtime but this was not satisfactory to Fuller. She said they must make a selection as presented on the schedule and when they refused she informed them that they were

terminated. When Charles Kouns returned from his 2-day suspension she again asked him to make a selection on the overtime, he refused, and he too was terminated.

Following these terminations, grievances were filed and a hearing was held before an arbitrator on November 19. On January 20, 1982, the arbitrator issued his award and opinion.[5]

In his opinion of January 20, 1982, the arbitrator concluded that Charles Newman and Chester Kouns were properly discharged because they refused to accept the concept of mandatory overtime as provided for in the contract between the Respondent and the Union, and were deliberately attempting to avoid mandatory overtime while at the same time giving it lip service. The arbitrator concluded that the signup sheet was of course "not an individual contract or agreement with the employees" and was in no way an attempt to subvert the collective-bargaining agreement. It was, the arbitrator is convinced, an honest attempt by the general manager to arrange for the performance of overtime work in the least inconvenient manner possible. Her efforts to obtain voluntary overtime, which she had determined was necessary, had failed and the arbitrator was convinced that it was clear to all involved that she was informing them that she had now reached a point where overtime would have to be mandatory.

With regard to Chester Kouns, the arbitrator concluded that his discharge should be converted to a 30-day suspension and that he should be reinstated without a loss of seniority and that he should receive backpay.

As indicated, the General Counsel takes the position that the Respondent's requirement that the employee make a selection on the schedule for working overtime was in fact the signing of an agreement to perform overtime which is a working condition subject to collective bargaining and that the Respondent was in effect attempting to negotiate separately with the employees, thereby bypassing the collective-bargaining representative in violation of Section 8(a)(3) and (1) of the Act.

The Respondent argues that it was in no way attempting to bypass the collective-bargaining representative, that at all times the bargaining representative was aware of the situation and in fact was present prior to the employees' second suspension and ultimate discharge and in fact had urged the employees to go ahead and sign the selection of overtime and to grieve the matter. The Respondent further argues that it has not committed any unfair labor practice and that if there was any unfair labor practice, that the matter was handled by arbitration and that the Board should defer under *Spielberg Mfg.* to the arbitrator's decision of January 20, 1982.

[5] The unfair labor practice was filed by Chester Kouns on October 16. On November 20, the Regional Office deferred processing the charge any further while the underlying dispute was being processed in the grievance procedure pursuant to the Board's decision in *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). At that time the parties were notified that once the arbitrator had issued a decision then consideration would be given to that decision in accordance with *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Suburban Motor Freight*, 247 NLRB 146 (1980).

Discussion and Conclusions

The thrust of the complaint of the General Counsel is that the three individuals involved were suspended and ultimately discharged because they "refused to sign individual agreements with Respondent stating that they would work certain overtime hours." There does not appear to be any doubt that at least in the view of the Respondent there was a necessity for overtime to be performed. It also appears that voluntary overtime was not getting the job done. Notwithstanding the fact that the Respondent's manager had met with the Union in June and had assurances from both the president and steward of the Union that there was no problem in requesting the overtime and that it would be done, in September, the Respondent's manager became acutely aware that volunteer overtime was not forthcoming. At this point she determined that only mandatory overtime as provided by the contract would be appropriate. Therefore, she determined the number of hours required by each of the employees and made the determination that overtime was necessary by all members of the bargaining unit and, on September 11, called a meeting and notified the employees that mandatory overtime would be required. She advised that the volunteers were insufficient and that the employees were given a choice of overtime schedules. That is, they had two options, they could select 15 hours of overtime each week for 2 weeks or 10 hours each for 4 weeks. The employees were requested to sign the schedule making their selection and to sign the calendar on the back of the door to indicate the hours they were ready to work each day so that the office could schedule the work properly. Fuller first presented the schedule to Chester Kouns who looked it over for a long time before handing it to Charles Newman, the union steward. At this point Fuller removed the signup sheet from Newman's hand and gave it back to Kouns and told him to sign it first and then pass it on to Newman. Kouns read over the schedule and was about to sign when steward Newman stood up and said that he could not sign the paper; that he needed some time to think about it. Chester Kouns also refused to sign the paper. Both were suspended and ultimately discharged because they refused to accept the overtime schedule. Chester Kouns also refused to sign the overtime schedule or make any selection as to overtime, indicating that 40 hours of work was enough for him.

It is clear that the employees were given the opportunity to make an overtime selection by signing the sheet, and then protesting the matter through the grievance procedure, which incidentally was suggested by the Union, but which the employees continued to refuse to do.

Like the arbitrator, I do not find the signup sheet as presented to the employees on September 11, and various times thereafter, to be "an individual contract or agreement with the employees" thereby bypassing the collective-bargaining representative and subverting the collective-bargaining agreement. It appears to me that the Respondent was attempting to fully comply with the collective-bargaining agreement in that it had made every effort to have employees volunteer for overtime, and

when that was not forthcoming, the Respondent made the decision pursuant to the collective-bargaining agreement to have mandatory overtime. There is no question here about seniority as set forth in the collective-bargaining agreement. All employees were requested to work. Thus, there was no discrimination or disparate treatment in the application of the contract provision requiring mandatory overtime.

As I stated, all employees were requested to work or ordered to work. As a matter of fact, earlier in June, the Respondent had informed the Union of its need for overtime and was assured of the Union's fullest cooperation. In fact, one of the alleged discriminatees, Charles Newman, the Union's steward, was present at that meeting and indicated that he saw no problem with the overtime. Yet, Newman was the first employee to refuse to accept the Respondent's mandatory request for overtime. It is also my conclusion that the Respondent's form of ordering the overtime was reasonable, that it gave the employees a choice of performing the overtime. The only thing that the Respondent requested was that they make a selection and indicate what hours in each given week they would be available to work so that the Respondent could schedule the overtime work. There does not appear to be anything unreasonable about this request or pronouncement on the Respondent's part. With the exception of the three employees involved, the remaining employees made their selection, performed the overtime, and even made up the time that was not worked by the alleged discriminatees.

Again, I repeat, I cannot find that the Respondent was attempting to circumvent the collective-bargaining agreement and negotiate directly with the employees. I certainly cannot find that the request of these employees to make a selection by signing their name on a piece of paper, which would give them a choice as to overtime, was insisting upon an agreement in derogation of the collective-bargaining agreement. It is clear to me, and it is my conclusion, that it was very clear to all the employees involved that the Respondent was merely presenting a so-called signup sheet for overtime only for scheduling purposes and that each and every one of the employees knew that and that by refusing to make a selection of their preferences on overtime schedules that they were in fact refusing to work overtime.

It is my conclusion that the alleged discriminatees, Charles Newman, Chester Kouns, and Charles Kouns were opposed to the concept of mandatory overtime as set forth in the collective-bargaining agreement negotiated between the Union and the Respondent. It is further my conclusion that these employees did not want to give up their practice of accepting overtime at their choosing. Therefore, it is my conclusion that these employees refused to perform overtime in accordance with the collective-bargaining agreement and were thus insubordinate and were properly discharged as not complying with the mandatory requirements of the contract.

I do not regard the signup sheet as an agreement to perform overtime. There was no question about the performance of the overtime. It was mandatory under the contract and the number of hours had been set by the Respondent. Had the employees objected to the reasonableness of the overtime, they merely could have filed a grievance on that matter and had it readily determined. In fact, it was even suggested to them by their union that they go ahead and sign the sheet and grieve the matter. They chose not to do this because, as I conclude, they were against working any overtime other than that for which they volunteered.

It is apparent that there was an objection to the mandatory overtime hours, as suggested by the Respondent because, on the date of their discharge, Charles Newman and Chester Kouns indicated that they would work 8 hours of overtime but not the hours set forth on the signup sheet. This to me indicates that they were not concerned about signing an agreement but they were disagreeing with the number of hours of overtime as suggested by the Respondent. Therefore, to me, it is clear that these employees were discharged not because of any attempt to circumvent the collective-bargaining agreement, or to bypass the collective-bargaining representative, but simply and solely because they refused to perform overtime in conformity with the provisions of the collective-bargaining agreement. Therefore, it is my conclusion that the General Counsel has failed to establish by a preponderance of the evidence that the Respondent has engaged in any conduct violative of Section 8(a)(3) and (1) of the Act, and therefore, I shall recommend that this complaint be dismissed in its entirety.

Having found that the Respondent has not engaged in the violations of the Act as alleged in the complaint, I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not, as alleged in the complaint, engage in any conduct violative of Section 8(a)(3) and (1) of the Act.

On the basis of the foregoing findings of fact and conclusions and on the entire record, I issue the following recommended

ORDER[6]

The complaint is hereby dismissed in its entirety.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.